

1995

# Abdelaziz Aboelseud v. State of Utah : Brief of Appellant

Utah Court of Appeals

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Katherine L. Bernards-Goodman.

Ronald F. Price.

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**COURT OF APPEALS**

**IN THE UTAH COURT OF APPEALS**

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ABDELAZIZ ABOELSEUD,	)	
	)	
Defendant/Appellant	)	
	)	Case No. 95-374-CA
vs.	)	
	)	
STATE OF UTAH,	)	Priority 2
	)	
Plaintiff/Appellee.	)	

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**BRIEF OF APPELLANT**

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Appeal From A Judgment Of The Third Circuit Court,  
State Of Utah, Salt Lake County, Salt Lake Department  
Honorable T. Patrick Casey, Third Circuit Court Commissioner

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## IN THE UTAH COURT OF APPEALS

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	)	
Defendant/Appellant	)	
	)	Case No. 95-374-CA
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	)	
STATE OF UTAH,	)	Priority 2
	)	
Plaintiff/Appellee.	)	

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### BRIEF OF APPELLANT

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#### APPELLATE COURT JURISDICTION

This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(d) and § 78-2a-3(e).

#### ISSUES PRESENTED AND STANDARD OF REVIEW

Issue One: Whether the trial court erred in ruling that the defendant/appellant ("Mr. Aboelseud") waived the statutory requirement of Utah Code Ann. § 76-5-108 that the plaintiff/appellee ("State") prove he was properly served with a copy of the protective order which he is alleged to have violated.

**Standard of Review:** The trial court's ruling is a question of law, and is reviewed for correctness. *See Baldwin v. Burton*, 850 P.2d 1188, 1192 (Utah 1993); *Southern Title Guar. Co. v. Bethers*, 761 P.2d 951, 954 (Utah Ct. App. 1988).

Issue Two: Whether the trial court erred in ruling that Mr. Aboelseud violated the protective order by attempting to telephone the parents of Stephana Garcia ("Ms. Garcia") at their place of residence, where the protective order does not prohibit Mr. Aboelseud from contacting Ms. Garcia's parents, and whether such ruling violates Mr. Aboelseud's rights to due process under the constitutions of the State of Utah and United States.

**Standard of Review:** The trial court's ruling is a question of law, and is reviewed for correctness. *See Baldwin*, 850 P.2d 1188.

Issue Three: Whether the trial court's ruling that a negligent violation of a protective order constitutes a criminal violation under Utah Code Ann. § 76-5-108 is erroneous.

**Standard of Review:** This question is a question of law, and is reviewed for correctness. *See Baldwin*, 850 P.2d 1188.

Issue Four: Whether the trial court's ruling is erroneous in light of the fact that Ms. Garcia consented to contact from Mr. Aboelseud by answering the telephone when she had actual knowledge that Mr. Aboelseud was the person calling.

**Standard of Review:** This question is a question of law, and is reviewed for correctness. *See Baldwin*, 850 P.2d 1188.



## DETERMINATIVE STATUTES

Utah Code Ann. § 76-5-108 (as amended May 3, 1993)<sup>1</sup> and Utah Code Ann. § 30-6-5(5)(a), (6) (as amended May 3, 1993) are the primary determinative statutes.

Utah Code Ann. § 76-5-108 (as amended May 3, 1993) provides as follows:

Any person who has been restrained from abusing or contacting another or ordered to vacate a dwelling or remain away from the premises of the other's residence, employment, or other place as ordered by the court under a protective order or ex parte protective order issued under Title 30, Chapter 6, or Title 78, Chapter 3a, who violates that order after having been properly served with it, is guilty of a class A misdemeanor.

Utah Code Ann. § 30-6-5(5)(a), (6) (as amended May 3, 1993) provides:

(5) Upon issuance of a protective order, either ex parte or following a hearing, the court clerk shall provide four certified copies to the party protected by that order. The protected party shall keep one certified copy and shall:

(a) cause a certified copy to be served on the party restrained, in accordance with Rule 4 of the Utah Rules of Civil Procedure;

(6) If the defendant has been personally served with the ex parte protective order and notice of the hearing regardless if he appears at the hearing, and the court issues a protective order, the terms of the ex parte protective order shall remain in effect until a certified copy of the protective order is properly served on the defendant.

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<sup>1</sup>Utah Code Ann. § 76-5-108 was amended effective July 1, 1995, after the trial of this matter and, therefore, the 1995 amendment is not determinative. However, as set forth more fully below, the 1995 amendment clarifies that a violation of a protective order must be intentional to constitute a criminal offense, thereby evidencing additional reasons that the judgment of the trial court should be reversed.

## STATEMENT OF THE CASE

**Nature of the Case.** This is a criminal action whereby the State asserted that Mr. Aboelseud violated a mutual protective order by placing telephone calls to the residence of Ms. Garcia's parents.

**Course of Proceedings and Disposition Below.** The State brought two criminal charges against Mr. Aboelseud pursuant to Utah Code Ann. § 76-5-108, alleging that Mr. Aboelseud violated a mutual protective order (granted in a protective order proceeding commenced by Mr. Aboelseud) by (1) appearing at an open court proceeding where Ms. Garcia was appearing for a pre-trial on criminal charges of assault and battery against Mr. Aboelseud,<sup>2</sup> and by (2) placing telephone calls to the residence of Ms. Garcia's parents, where Ms. Garcia and Mr. Aboelsued's two children also resided. At the trial held on April 28, 1995, the State stipulated that Mr. Aboelseud had never been served in the manner required by Utah R. Civ. P. 4 with a certified copy of the protective order. The trial court ruled, however, that service in the manner contemplated by Utah R. Civ. P. 4 of a certified copy of a mutual protective order is not required where the party restrained by the protective order is present at the hearing where the protective order is granted, that Mr. Aboelseud was precluded from raising lack of proper service as a defense to the criminal charges, and that Mr. Aboelseud waived the personal service requirement of Utah Code Ann. § 30-6-5 by filing a complaint asking that the district court issue a

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<sup>2</sup>Ms. Garcia testified at trial that she ultimately pleaded guilty to these charges. (R. at 68).

protective order in his favor and against Ms. Garcia and by having Ms. Garcia sign an acceptance of service of process, waiving the formal requirements of Utah R. Civ. P. 4.

The trial court then ruled that Mr. Aboelseud did not violate the protective order by appearing at the court proceeding, and dismissed the first count alleged against Mr. Aboelseud. The trial court then ruled, however, that Mr. Aboelseud was guilty of the second count of violating the protective order. On May 30, 1995, Mr. Aboelseud filed his notice of appeal, appealing the conviction on the second count.

### **STATEMENT OF FACTS**

1. Mr. Aboelseud had a long-term on and off relationship with Ms. Garcia. (R. at 59).

2. Mr. Aboelseud is the father of two minor children, ages 5 and 2, whose mother is Ms. Garcia. (R. at 69).

3. Ms. Garcia refused to acknowledge that Mr. Aboelseud is the father of at least one of the children and, therefore, Mr. Aboelseud was required to commence a paternity action, pro se, in order to establish his relationship as the father, and so he could obtain visitation with his children. (R. at 71-73 ).

4. In about September 1994, Mr. Aboelseud commenced an action in the Third District Court, State of Utah seeking a protective order pursuant to Utah Code Ann. § 30-6-5, seeking protection from Ms. Garcia, who had physically attacked him on more than one occasion. (R. at 59, 60, State's Exhibits 1, 2 and 3).

5. On September 28, 1994, a hearing was held before the Honorable Commissioner Michael S. Evans, pursuant to which Mr. Aboelseud's motion for protective order was granted. (R. at 61, State's Exhibit 2).

6. In addition, the Honorable Commissioner Michael S. Evans entered a protective order in favor of Ms. Garcia. Thus, a mutual protective order was entered by the Honorable Commissioner Michael S. Evans, which was subsequently entered by the Third District Court on October 6, 1994. (R. at 18, State's Exhibit 2).

7. The Protective Order provides, without limitation, that Mr. Aboelseud "is restrained from any contact whatsoever with [Ms. Garcia]." (State's Exhibit 2).

8. Utah Code Ann. § 76-5-108 provides that a person who has been restrained from having contact with another person, pursuant to a protective order issued pursuant to Utah Code Ann. § 30-6-1, et seq., is guilty of a class A misdemeanor if that person violates the protective order "after having been properly served with it. . ." Utah Code Ann. § 76-5-108 (emphasis added).

9. Utah Code Ann. § 30-6-5(5) provides, in part:

Upon issuance of a protective order, either ex parte or following a hearing, the court clerk shall provide four certified copies to the party protected by that order. The protected party shall keep one certified copy and shall:

(a) cause a certified copy to be served on the party restrained, in accordance with Rule 4 of the Utah Rules of Civil Procedure;

10. At the trial, the State stipulated to the fact that Ms. Garcia never formally served Mr. Aboelseud with a certified copy of the protective order in the manner contemplated by Rule 4, Utah R. Civ. P. (R. at 46-47).

11. Instead, the State argued that formal service was not required because Mr. Aboelseud had initiated the protective order proceeding, was present at the hearing at which the protective order was issued, and had actual notice of the existence of the protective order. (R. at 47).

12. The trial court ruled that by virtue of the fact Mr. Aboelseud had initiated the protective order proceeding, and because Ms. Garcia had executed a written acceptance of service of process waiving the formal requirements of Utah R. Civ. P. 4, Mr. Aboelseud had waived the requirement imposed by Utah Code Ann. § 76-5-108 that he be properly served by Ms. Garcia with a copy of the protective order. The trial court also ruled that Mr. Aboelseud was precluded from raising lack of proper service as a defense to the charges brought against him by the State. (R. at 54-55).

13. During the time frame in question, Ms. Garcia and the children lived with Ms. Garcia's parents at the home of Ms. Garcia's parents. (R. at 69).

14. Ms. Garcia testified that during the relevant time frame, Mr. Aboelseud placed five (5) telephone calls to the home of Ms. Garcia's parents. (R. at 63-64). Ms. Garcia further testified that the most Mr. Aboelseud ever said during any of the telephone calls was "Hello", and on one occasion Mr. Aboelseud said "Stephanie." (R. at 65).

15. Ms. Garcia claimed at trial that Mr. Aboelseud first called on October 17, 1995. *With respect to this telephone call, Ms. Garcia claimed that she knew it was Mr. Aboelseud even though she admitted the caller said absolutely nothing and hung up as soon as she answered the telephone, and even though she did, not that time, have caller ID.* (R. at 63).

16. Ms. Garcia testified that after this first alleged telephone call her parents obtained caller ID service from U.S. West on October 18, 1995, and that they obtained a caller ID box which would display the name of the individual originating the telephone call. (R. at 63, 64).

17. With respect to each of the four telephone calls that Ms. Garcia claimed occurred after her parents had obtained caller ID, Ms. Garcia admitted that she read the caller ID box display before answering the telephone, and that before she ever picked up the receiver she already knew Mr. Aboelseud was the person placing the telephone call. (R. at 70).

18. Despite Ms. Garcia's testimony at trial that Mr. Aboelseud said "Stephanie" on one occasion, Ms. Garcia admitted that when she filed her police report she told the police that the only thing Mr. Aboelseud ever said was "Hello." (R. at 75).

19. Ms. Garcia admitted that the telephone at her parents' home is registered in her parents' names. (R. at 76-77).

20. Mr. Aboelseud admitted at trial that he in fact placed a few telephone calls to the home of Ms. Garcia's parents during the relevant time frame. (R. at 87).

21. Mr. Aboelseud further testified that the only purpose of those telephone calls was to speak with Ms. Garcia's father, and that at no time did he ever call to speak with Ms. Garcia. (R. at 87). Mr. Aboelseud further testified that the purpose of these phone calls was to ask Ms. Garcia's parents to use their influence on their daughter to persuade her to submit herself and one of the children to a blood test that had been

ordered by the Honorable John A. Rokich, third district court judge, some ten months earlier. This testimony was un rebutted and uncontested at trial.

22. Mr. Aboelseud testified that at the time he tried to call Ms. Garcia's father that he, Mr. Aboelseud, was aware that Ms. Garcia's father works at a restaurant that he owns, that the restaurant is located only half a block away from the Garcia home, and that Mr. Garcia does not maintain specific, regular hours at the restaurant. (R. at 88).

23. The protective order at issue did not prohibit Mr. Aboelseud from contacting Ms. Garcia's parents. (*See* State's Exhibit 2).

### **SUMMARY OF ARGUMENTS**

The plain language of Utah Code Ann. § 76-5-108 and Utah Code Ann. § 30-6-5 make clear that a person can be held criminally liable for violating a protective order only if the State proves beyond a reasonable doubt that the defendant had been properly served, in accordance with the manner prescribed by Utah R. Civ. P. 4, with a certified copy of the protective order at the time of the alleged violation. The State admitted it could not prove this element of its prima facie case and, therefore, the trial court's ruling must be reversed.

The protective order at issue did not prohibit Mr. Aboelseud from contacting Ms. Garcia's parents. The trial court's finding that Mr. Aboelseud violated the protective order by attempting to telephone Ms. Garcia's parents at their home is erroneous, and such a broad interpretation of the protective order violates Mr. Aboelseud's due process rights under the constitutions of the State of Utah and the United States.

The evidence does not support the verdict. There was no evidence of any intent to violate to the protective order. Furthermore, Ms. Garcia admitted that at the time she answered the telephone, she had actual knowledge that Mr. Aboelseud was the person calling. Because Ms. Garcia answered the telephone with actual knowledge that Mr. Aboelseud was calling, Ms. Garcia consented to contact by Mr. Aboelseud, and the fact that Mr. Aboelseud then said "Hello" and on one occasion said "Stephanie" cannot constitute a violation of the protective order.

## **ARGUMENT**

**I. THE TRIAL COURT'S RULING THAT MR. ABOELSEUD COULD NOT ASSERT LACK OF PROPER SERVICE AS A DEFENSE AND THAT HE WAIVED THE STATUTORY REQUIREMENT OF PERSONAL SERVICE BY COMMENCING PROTECTIVE ORDER PROCEEDINGS IS ERRONEOUS.**

**A. The Statutory Requirement Of Proper Service With A Certified Copy Of The Protective Order Is An Element Of The State's Prima Facie Case, And Is Not A Defense That Can Be Waived.**

The trial court ruled that Mr. Aboelseud was "precluded from raising the issue of service or failure to obtain service as a defense" to the charges asserted against him. (R. at 54). However, Utah Code Ann. § 76-5-108 makes clear that the State must prove, as an element of its prima facie case, that, at the time of the alleged violation, the defendant had been "properly served" with the protective order. Specifically, Utah Code Ann. § 76-5-108 provides that a person who has been restrained from having contact with another person, pursuant to a protective order issued pursuant to Utah Code Ann. § 30-6-1, et seq., is guilty of a class A misdemeanor if that person violates the protective order "after



having been properly served with it. . ." Utah Code Ann. § 76-5-108 (emphasis added).

The trial court's ruling that "the issue of service or failure to obtain service" was a defense, and that Mr. Aboelseud could not raise the issue at trial, is erroneous.

**B. The State Admitted That Mr. Aboelseud Had Never Been Served In The Manner Required By The Statute.**

Prior to the commencement of trial, the State admitted that Mr. Aboelseud had not been properly served with a certified copy of the protective order. *See* Statement of Facts ("Facts"), *supra* at ¶ 10. In light of this admission, the State could not prove all of the elements necessary to establish its prima facie case under Utah Code Ann. § 76-5-108. Therefore, the trial court's ruling that Mr. Aboelseud was guilty on the second count is erroneous and must be reversed.

In order to avoid the undisputable fact that Mr. Aboelseud was never properly served with the protective order, the State argued to the trial court that personal service in compliance with Utah R. Civ. P. 4 was not required, and that constructive service, or actual notice, was sufficient to comply with the statutory requirement that the protective order be "properly served." *Facts, supra* at ¶ 11. The trial court then interpreted Utah Code Ann. § 30-6-5 in a manner which did not require personal service, and held that because Ms. Garcia had signed a formal acceptance of service of process, that Mr. Aboelseud had thereby waived service of process. The trial court's rulings on these issues are erroneous.

As set forth above, Utah Code Ann. § 76-5-108 makes clear that a person cannot be held criminally liable for violating a protective unless the States proves that, at the

time of the alleged violation, the defendant had been "properly served" with the protective order. For purposes of this action, the definition of "properly served" is found in Utah Code Ann. § 30-6-5(a) which provides:

(5) Upon issuance of a protective order, either ex parte or following a hearing, the court clerk shall provide four certified copies to the party protected by that order. The protected party . . . shall: (a) cause a certified copy to be served on the party restrained, in accordance with Rule 4 of the Utah Rules of Civil Procedure; (Emphasis added).

Under the plain language of the statute, the only type of service which constitutes proper service for purposes of Utah Code Ann. § 76-5-108 is where service is made in accordance with Utah R. Civ. P. 4. This conclusion is buttressed by the language of Utah Code Ann. § 30-6-5(6) which provides:

If the defendant has been personally served with the ex parte protective order and notice of the hearing regardless if he appears at the hearing, and the court issues a protective order, the terms of the ex parte protective order shall remain in effect until a certified copy of the protective order is properly served on the defendant. (Emphasis added).

This particular statutory provision reemphasizes and makes clear that the fact a restrained party is present at the hearing where a protective order is granted does not alter the fact that the protected is obligated to "properly serve," in the manner specified by Utah R. Civ. P. 4, the restrained party with a certified copy of the protective order.

Here, the State admitted at trial that no such personal service occurred. Therefore, according to Utah Code Ann. § 76-5-108, Mr. Aboelseud cannot be held to have committed a criminal violation of the protective order.<sup>3</sup>

Furthermore, the trial court's conclusion that Mr. Aboelseud waived the statutory service requirement because it was he who commenced the protective order proceedings, and because Ms. Garcia, as opposed to Mr. Aboelseud, signed a written acceptance of service of process, cannot be supported by the facts or applicable law. Utah law is clear that in order to create a valid waiver, there must have been "a voluntary and intentional relinquishment of a known right." *Beckstead v. Deseret Roofing Co.*, 831 P.2d 130, 132 (Utah Ct. App. 1992) (quoting *Anderson v. Brinkerhoff*, 756 P.2d 95, 98 (Utah Ct. App. 1988)). Here, there is simply no evidence whatsoever that Mr. Aboelseud ever engaged in any such intentional relinquishment of a known right. On the contrary, the only person who made such a waiver was Ms. Garcia. It is an impermissible, and factually and legally insupportable, leap to conclude that because Ms. Garcia waived her right to be served in accordance with Utah R. Civ. P. 4, that Mr. Aboelseud also made such a waiver. Mr. Aboelseud never executed any written waiver or acceptance of service of process waiver, nor is there any evidence of any kind that he ever orally expressed any intention to make such a waiver.

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<sup>3</sup>Whether Mr. Aboelseud committed a civil violation that would subject him to civil penalties is an issue not before this Court.

**II. THE PROTECTIVE ORDER DID NOT PROHIBIT MR. ABOELSEUD FROM CONTACTING MS. GARCIA'S PARENTS. THE COURT'S RULING THAT THE PROTECTIVE ORDER PROHIBITED SUCH CONDUCT IS ERRONEOUS.**

It is undisputed that the protective order did not prohibit Mr. Aboelseud from communicating with Ms. Garcia's parents, that Mr. Aboelseud's only purpose in placing the telephone calls to the Garcia residence was to speak with Ms. Garcia's father, and that at no time did Mr. Aboelseud call with an intent or desire to speak with Ms. Garcia. Notwithstanding these facts, the trial court ruled that Mr. Aboelseud should have known that Ms. Garcia might answer the telephone and that, therefore, Mr. Aboelseud was guilty of violating the protective order by attempting to communicate by telephone with Ms. Garcia's father. Such a ruling is not supported by the language of the protective order, which does not prohibit Mr. Aboelseud from communicating with Ms. Garcia's father. The trial court's ruling on this issue is erroneous and violates Mr. Aboelseud's rights to due process under the constitutions of the State of Utah and the United States because the protective order did not prohibit him from communicating with Ms. Garcia's father. To make such conduct a crime even though it was not prohibited by the plain language of the protective order denies Mr. Aboelseud his rights to due process.

**III. THE TRIAL COURT'S RULING THAT MR. ABOELSEUD IS CRIMINALLY LIABLE FOR NEGLIGENT VIOLATION OF THE PROTECTIVE ORDER IS ERRONEOUS. UTAH CODE ANN. § 76-5-108 CONTEMPLATES THAT A VIOLATION MUST BE INTENTIONAL IN ORDER TO CONSTITUTE A CRIMINAL ACT.**

The trial court ruled that Mr. Aboelseud had "reason to know" that Ms. Garcia might answer the telephone instead of one of her parents and that, therefore, placing the

telephone calls was a criminal act, even though the calls were intended for Ms. Garcia's father. Thus, in essence, the trial court ruled that a negligent violation of the protective order constitutes a criminal act. However, Utah Code Ann. § 76-5-108 contemplates that only an intentional violation will constitute a criminal act. This conclusion is supported by the recent clarifying amendment to this section of the code, which amendment clearly provides for criminal liability only where a person "intentionally violates" a protective order. Utah Code Ann. § 76-5-108(1) (as amended July 1, 1995). Because there is no evidence in the record that Mr. Aboelseud intentionally violated the protective order, the trial court's ruling must be reversed.

**IV. MS. GARCIA ADMITTED SHE ANSWERED THE TELEPHONE WITH ACTUAL KNOWLEDGE THAT MR. ABOELSEUD WAS THE PERSON CALLING. THEREFORE, MS. GARCIA CONSENTED TO CONTACT BY MR. ABOELSEUD.**

The record is clear that before Ms. Garcia answered the telephone calls in question, she had actual knowledge that Mr. Aboelseud was the person calling. Therefore, Ms. Garcia consented to the contact from Mr. Aboelseud. Because Ms. Garcia consented to the contact, Mr. Aboelseud cannot be held to have violated the protective order. The trial court's ruling that Mr. Aboelseud violated the protective order is not supported by the evidence and must be reversed.

**CONCLUSION**

For all of the foregoing reasons, the judgment against Abdelaziz Aboelseud should be reversed, and the charge against him should be dismissed with prejudice.

Respectfully submitted,

DATED this 7th day of December, 1995.

PARSONS, DAVIES, KINGHORN & PETERS  
185 South State Street, Suite 700  
Salt Lake City, Utah 84111

A handwritten signature in black ink, appearing to read "Ronald F. Price", is written over a horizontal line.

Ronald F. Price  
Attorneys for Abdelaziz Aboelseud

## CERTIFICATE OF SERVICE

I certify that the original and seven (7) copies of the foregoing BRIEF OF APPELLANT were mailed on this 7th day of December, 1995, postage fully prepaid, to the Clerk of the Court, Utah Court of Appeals, 230 South 500 East, Suite 400 Salt Lake City, Utah 84102.

I further certify that two (2) copies of the foregoing BRIEF OF APPELLANT were mailed, postage fully prepaid, on the 7th day of December, 1995, to Katherine L. Bernards-Goodman, Deputy District Attorney, 210 West 10000 South, Salt Lake City, Utah 84070.

A handwritten signature in black ink, appearing to read "Ronald R. May", is written over a horizontal line. The signature is stylized with large, sweeping loops.

lrfp\aboelseu\brief app

## ADDENDUM



IN THE THIRD CIRCUIT COURT IN AND FOR THE STATE OF UTAH

SALT LAKE CITY DEPARTMENT

-o0o-

STATE OF UTAH,	)	
	)	
Plaintiff,	)	Case No. 941019646
	)	
vs.	)	<u>TRIAL</u>
	)	
ABDELAZIZ ABOELSEUD,	)	
	)	[Prepared without log
Defendant.	)	notes]

-o0o-

BE IT REMEMBERED that on the 28th day of April, 1995, the above-entitled matter came on for hearing before the Honorable T. Patrick Casey, sitting as Judge in the above-named Court for the purpose of this cause, and that the following proceedings were had.

-o0o-

A P P E A R A N C E S

For the State:

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**FILED**  
Utah Court of Appeals

**SEP - 6 1995**

Marilyn M. Branch  
Clerk of the Court

**950374**

1 with Mr. Aboelseud again, I have not talked to Ms. Frank, is  
2 that they were both very surprised that they ended up with a  
3 protective order.

4 So, whether that goes to whether it's stipulated--

5 THE COURT: Okay. That's an issue, as to, I  
6 suppose, go to the merits, how--there's some argument on the  
7 merits of the protective order, but I'm just--I want to make  
8 sure I understand how this came about.

9 MS. BERNARDS-GOODMAN: Your Honor--

10 THE COURT: If Mr. Aboelseud was present in Court,  
11 had counsel, Counsel had the defendant sign acceptance of  
12 service, Counsel undoubtedly assisted Mr. Aboelseud in  
13 getting--is it Aboelseud?

14 MR. PRICE: Yes. It's--the spelling of the last  
15 name actually ends in e-u-d, not e-d.

16 THE COURT: E-u-d. Okay.

17 Went and obtained the Judge's signature on the  
18 protective order after it was signed off on by the domestic  
19 relations commissioner that heard the matter, at least if  
20 normal procedure was followed.

21 And that there--I can think of no circumstance under  
22 which if the protective order was issued that way, Mr.  
23 Aboelseud would have had anybody to serve on him. I mean, she  
24 got the protective order served on her by mail, but it was his  
25 counsel that facilitated obtaining the protective order as I

1 understand it.

2 I believe, for purposes of the statute, the  
3 requirement of service was met when he and counsel obtained  
4 the protective order as a mutual protective order in that case  
5 because it was recommended by the Judge, and received a  
6 personal copy of it at the time.

7 MR. PRICE: If--if I could address that--

8 THE COURT: Okay.

9 MR. PRICE: --briefly, your Honor.

10 I think the--the wording of the statute, I think is  
11 critical, and let me hand your Honor a copy of the applicable  
12 provision here with the--

13 THE COURT: I understand.

14 MR. PRICE: --highlighted in yellow on the copy.  
15 And that--down there in Sub 5(A)--

16 THE COURT: Uh huh.

17 MR. PRICE: --it talks specifically about whether a  
18 protective order is issued either ex-parte or following a  
19 hearing.

20 THE COURT: Uh huh.

21 MR. PRICE: And the statute contemplates a hearing  
22 and I think the way it typically happens is, the parties are  
23 present once they get to this point; where Ms. Garcia had been  
24 served with an ex-parte protective order and the hearing then  
25 was held on September 28th.

1           And I think the language referring to a hearing in  
2 the statute would be superfluous if constructive notice was  
3 sufficient. I don't think there's any other--I think that the  
4 fact that the statute contemplates a hearing and service  
5 following the hearing, I think is critical.

6           THE COURT: Well--

7           MS. BERNARDS-GOODMAN: And your Honor, if I could  
8 respond.

9           THE COURT: Just a moment, though.

10           The defendant in this case, the plaintiff in the  
11 protective order proceeding, is the one who had to serve it  
12 and the statute requires him to serve it 'cause he's the one  
13 that took the initiative to get it, and the fact that it also  
14 restrains him didn't--doesn't impose upon the other party, the  
15 responding party, to turn around and serve it back on him.  
16 That seems to me to be nonsensical kind of--kind of  
17 requirement.

18           MR. PRICE: And if--and if I could address that  
19 briefly, your Honor.

20           THE COURT: Okay.

21           MR. PRICE: The statute Sub 5 is not talking in  
22 terms of, if the plaintiff obtains a protective order. It's  
23 talking in terms of following issuance of a protective order,  
24 any protective order, the--and then it says, the party--

25           THE COURT: Uh huh.

1 claiming it hasn't been served upon them when they have the  
2 notice.

3 And I don't think that's noticed in Section--or  
4 mentioned in Section 76-5-108.

5 THE COURT: Okay. Anything else?

6 MR. PRICE: Just to respond briefly to the  
7 legislative intent argument. I think the Utah law is clear  
8 when interpreting the statute, you have to start with the  
9 plain language of the statute, and you have to reconcile all  
10 of the words that are used in the statute before you even go--  
11 before you take any further steps, and I think the plain  
12 language of the statute is clear with respect to issuance of  
13 any protective order and that any party that's protected has  
14 to comply with the service procedures.

15 THE COURT: It is my view, regardless of what might  
16 have happened in--in other circumstances, that in proceeding  
17 by obtaining a waiver of service or an acceptance of service  
18 by mail from the defendant in that case, that the plaintiff in  
19 that case, the defendant in this case, is precluded from  
20 raising the issue of service or failure to obtain service as a  
21 defense to this proceeding. Clearly, under the terms of the  
22 protective order, the defendant would have been restrained  
23 from the conduct.

24 It's not a question of not knowing that the conduct  
25 was prohibited. It's a matter of trying to use a claimed

1 defect in service to avoid the consequences of violating the  
2 order and I--I believe that it is a fair reading of the  
3 statute and of the intent of the statute that in obtaining the  
4 protective order, particularly at least in this case, where  
5 the plaintiff obtained in that--plaintiff in that case, I'm--  
6 have to keep the--where Mr. Aboelseud obtained a--an  
7 acceptance of service and therefore, essentially a waiver of  
8 the service requirements in this case, that he cannot turn  
9 around and say, but I didn't waive it and--and I have a right  
10 to require that she serve it on me.

11           Therefore, it would be my ruling in this that that  
12 requirement would not preclude prosecution for this offense.

13           MR. PRICE: And if I could just make one last point  
14 for the record, your Honor. I think it's our position that  
15 the requirement of proper service is not strictly a defense to  
16 the charge, but is in fact an element of the prosecution to  
17 prima facie case and I don't think--the fact that Title 78--or  
18 Title 76, excuse me, specifically refers to proper service, I  
19 don't think constructive service constitutes proper service  
20 and therefore I don't think they can meet the elements of  
21 their case.

22           THE COURT: All right. And you can reserve that  
23 argument, certainly, for purposes of any appeal, but that  
24 doesn't change my ruling in this case.

25           Now, did you want to proceed with a trial in this

1 contact whatsoever, other than to turn around and look and see  
2 if she's there, contact--constitutes a violation of an order  
3 not to make contact.

4 I think a fair reading of the order is if he came,  
5 he sure couldn't go up and talk to her, he couldn't probably  
6 make gestures at her or pass notes to her or glare at her in  
7 an attempt to do anything to intimidate her or anything like  
8 that; but showing up at a hearing, at this point, would be  
9 Constitutionally protected and even in October, is something  
10 that I think that Mr. Aboelseud had a right to do, so long as  
11 he was on his best behavior, which he evidently was, and then  
12 complied with the request to leave.

13 So, in many circumstances, I would certainly prefer  
14 that both parties to a situation like this not be present in  
15 the courtroom, but the fact of the matter is, it's an open  
16 proceeding, he's an interested party and has a right to--to be  
17 aware of what goes on in Court, so long as he doesn't  
18 otherwise violate the protective order by directly making  
19 contact.

20 So, I will not find the defendant guilty of the  
21 first count.

22 With respect to the second count, there's no  
23 evidence in connection with that charge of any sort of abusive  
24 or threatening behavior; however, I think that the conduct of  
25 the defendant clearly falls within the meaning of the no

1 contact provision.

2 He calls a place where he knows that the defendant  
3 (sic) lives on at least one occasion, when the phone is  
4 answered, he asks in a questioning voice, "Stephana?" As if,  
5 "Are you there?" Or "Is that who's answering the phone?"  
6 Clearly has reason to know that the--that Ms. Garcia is as  
7 likely as anybody to pick up the phone, and perhaps the most  
8 likely during this time of the day.

9 There may have been a reason for it, but there are  
10 other ways of accomplishing that purpose. I don't think that  
11 those reasons justify making the contact.

12 Therefore, Mr. Aboelseud, I will find you guilty of  
13 the second count of violating the protective order.

14 Did you wish me to consider the sentence on this  
15 today?

16 MR. PRICE: Yes, your Honor.

17 THE COURT: I understand the circumstances and the  
18 facts in connection with the case, so you don't need to  
19 restate those for me. Would you like to--you should, and your  
20 client should stand at the lectern at this point--like to  
21 address me regarding sentencing issues? Anything I ought to  
22 be aware of?

23 MR. PRICE: Yes, beyond the facts of the case, your  
24 Honor, we would simply indicate that the--the facts of the  
25 case certainly, I don't think, justify any jail sentence being